NO. NHH-CV19-5003875	:	**SUPERIOR COURT/**
	:	**HOUSING SESSION**
NYRIEL SMITH, et al.,	:	**J.D OF NEW HAVEN**
Plaintiffs	:	
v.	:	
CITY OF NEW HAVEN, et al.,	:	
Defendants	:	**JULY 16, 2019**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The plaintiffs filed this class action Complaint on May 16, 2019, alleging that defendants have violated various laws related to protection from lead-paint. Their initial pleadings included a summons, complaint, application for preliminary injunction, request for waiver and bond and order to show cause. On May 20, they filed those papers as served, with the marshal's certification. Not a single one of those documents contained the return date required by Connecticut statute in order to initiate civil process, creating a fatal defect that deprives this Court of personal jurisdiction over the defendants. As stated by the Connecticut Appellate Court, "The absence of a return date on the writ, whether the fault of a plaintiff or a court clerk, is unforgivable." Raynor v. Hickock Realty Corporation, 61 Conn. App. 234, 242 (2000). As a result, this lawsuit should be dismissed.

"A motion to dismiss is used to assert jurisdictional flaws that appear on the record . . . ." Villager Pond, Inc. v. Darien, 54 Conn. App. 178, 182 (1999). "[O]nce the question of lack of jurisdiction of a court is raised, '[it] must be disposed of no matter in what form it is presented." Castro v. Viera, 207 Conn. 420, 429 (1988). This holds true for questions of personal

jurisdiction as well as subject matter jurisdiction. Steiman v. Pitkoff, Superior Court of Connecticut, Docket No. CV000373683 (Nov. 9, 2000) (2000 WL 1838691) (Exhibit 1). "Whenever a lack of jurisdiction appears on the record, the court must consider the question. The court must address itself to that issue and fully resolve it before proceeding further with the case." Valley Cable Vision, Inc. v. Public Utilities Commission, 175 Conn. 303 (1978) (citations omitted) (with regard to a motion to dismiss for defective process, thus implicating personal jurisdiction). As the court stated in Walker v. Supeau, 134 Conn. App. 444, 446 (2012), when faced with a motion to dismiss for lack of personal jurisdiction, a court must rule on the motion, "without ever considering, much less ruling on. . . the underlying claims." Moreover, the party who seeks the exercise of jurisdiction bears the burden of clearly demonstrating its basis. Electrical Contractors, Inc. v. Department of Education, 303 Conn. 402, 413-14 (2012).

Connecticut General Statutes section 52-45a requires that "[c]ivil actions shall be commenced by legal process consisting of a writ of summons or attachment, *describing* the parties, the court to which it is returnable, *the return day, the date and place for the filing of an appearance* . . . ." (emphasis added); *accord,* Practice Book section 8-1(a). A proper writ of summons "is a statutory prerequisite to the commencement of a civil action. Hillman v. Greenwich, 217 Conn. 520, 526 (1991). Although a writ of summons "need not be technically perfect . . . it *must* contain the basic information and direction normally included in a writ of summons." Id. (emphasis added). A "return date by which the defendant would have to file an

appearance . . . . is a necessary component of a writ by which a civil action is commenced." Howard v Robinson, 27 Conn. App 621, 626 (1992).

The Appellate Court considered this exact issue in Raynor v. Hickock Realty Corporation, 61 Conn. App. 234 (2000). In that case, the Court evaluated two related defects in the summons and complaint filed by plaintiff with its request for a prejudgment remedy: (1) lack of signature; and (2) lack of return date. Plaintiff asked the Court to "overlook" these defects, id. at 240, but the Court refused to do so. Even though the absence of a return date in Raynor appeared to be the fault of the trial court clerk, the Appellate Court ruled that this did not matter; it ruled that a civil action has not been "commenced" within the meaning of Connecticut law unless it has a return date, which is essential because both the time within which process must be served after its issuance and the time within which the writ must be filed with the court after service are determined by reference to the 'return day.' " Id. at 241-42. Moreover, the Appellate Court emphasized that a trial court "cannot ignore an omission" of such a nature. Id. at 240; *see also* Hillman, 217 Conn. at 526 (proper writ of summons "is an essential element to the validity of the jurisdiction of the court"); Carlson v. Fisher, 18 Conn. App. 488, 496-96 (1989) ("defect of an improper return day is not a minor defect"); Endyke v. Haverly, 1997 WL 630022 at **2-3 (Oct. 1, 1997) (Exhibit 2) (granting motion to dismiss complaint and application for temporary injunction where no pleadings contained elements required by section 52-45a and Practice Book, including return date; "failure to initiate a civil lawsuit through the use of mesne process deprives the court of jurisdiction," and statutory mesne process means process that "clearly apprises all concerned that a lawsuit is being

instituted, *and contains notice of the return date, and the requirement for filing an appearance*, . . . ") (emphasis added).

Plaintiff's defective process deprives the court of personal jurisdiction over the defendants. "A defect in process . . . such as an improperly executed writ, implicates personal jurisdiction." Alder v. Rosenthal, 163 Conn. App. 663, 674 (2016). Unless plaintiffs' process "is made *as the statute prescribes*, the court to which it is returnable does not acquire jurisdiction." Id (emphasis added). Failure to comply with statutory process requirements "will result in dismissal of the action for lack of personal jurisdiction . . . without reaching the merits of the plaintiff's underlying claims, if the defendants file a timely motion to dismiss." Walker, 134 Conn. App. at 445-446; *see also* Morgan v. Hartford Hosp., 301 Conn. 388, 401-402 (2011) (failure to perfect process per statutory requirements for initiating a claim "constitutes insufficient process and, thus . . . does not subject the defendant to the jurisdiction of the court"); Ribeiro v. Fasano, Ippolito and Lee, P.C., 157 Conn. App. 617 (2015) (Connecticut Supreme Court "has construed the term 'process' to include ... the summons, the complaint and any requisite attachments thereto" (internal quotations omitted)). An "important distinction" is that complete lack of return date is a more serious defect than "merely an improper return date." In re Natane D., Superior Court of Connecticut (Oct. 2, 2001) (2001 WL 1378782, n. 3) (Exhibit 3). Lacking a return date, plaintiffs' defective process deprives the court of jurisdiction by rendering the court incapable of determining compliance with other requirements of timely process. Id.

Some courts have held that defective process lacking a return date is an incurable defect. Vissicchio v. Greenspan, Superior Court of Connecticut, judicial district of New Haven, Docket No. CV030480706S (May 3, 2004) (2004 WL 1098808, *4) (Exhibit 4) ("jurisdictional defect [of missing return date] cannot be cured by the filing of an amended complaint."); *see also* In re Natane D., 2001 WL 1378782 at n.3 (while an improper return date "may be corrected under certain circumstances," the absence of a return date cannot be corrected). Nevertheless, other courts have held that plaintiffs can cure such a defect, under Connecticut General Statutes section 52-72, by moving to amend the writ, summons, and complaint, and reinitiating the action by new service of process. Hartford National Bank & Trust Co. v. Tucker, 178 Conn. 472, 478-79 (1979) (section 52-72 "requires the new service of the writ and process when they are amended to correct process . . . for any reason defective"); Coppola v Coppola, 243 Conn. 657, 666 (1998) ("return date may be amended, but it must still comply with" other statutory process requirements); RDC Sheet Metal Co. v. R.J. Patton Co., Inc., Superior Court of Connecticut, judicial district of New Haven, Docket No. CV040287201S (June 9, 2004) (2004 WL 1465647) (section 52-72 permits a party to amend process lacking a return date, but must prove return of new service of process to cure the original defect); Sodhi v. Nationwide Mut. Ins., Superior Court of Connecticut, Docket No. CV 960564554 (March 10, 1998) (1998 WL 161166) (Exhibit 5) (plaintiff may amend complaint to correct improper return date; section 52-72 requirement that amended process "shall be served in the same manner" affirmatively "requires new service of the amended writ"). Indeed, the legislature has considered the impact of dismissing an action for lack of jurisdiction for defective process and has given plaintiffs the

remedy of reinitiating the suit. Ribeiro, 157 Conn. App. at 630 (discussing C.G.S. § 52-592 provision that "if any action . . . has been dismissed for want of jurisdiction . . . the plaintiff . . . may commence a new action).

Because the papers filed and served by plaintiffs lack an essential component by which to commence a civil action, this lawsuit by plaintiff has never been commenced within the meaning of Connecticut law. The Court therefore lacks jurisdiction, and this case should be dismissed.[1]

CONCLUSION

For the reasons set forth above, the Court should dismiss this case.

DEFENDANTS
CITY OF NEW HAVEN, TONI HARP,
BYRON KENNEDY & PAUL KOWALSKI

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[1] The Court's electronic file reflects a return date of May 16, 2019, which is actually the filing date, not a return date. But May 16 could not be the return date in this case because that is a Thursday, and a return date in a case such as this must be a Tuesday under section 52-48(a) of the Connecticut General Statutes ("Process in civil actions, including transfers and applications for relief or removal, but not including summary process actions, brought to the Superior Court may be made returnable on any Tuesday in any month").

CERTIFICATION

This is to certify that a copy of the foregoing Memorandum of Law was electronically mailed on this 16th day of July 2019 to all counsel and pro se parties of record as follows:

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EXHIBIT 1

2000 WL 1838691
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Esther STEIMAN,
v.
Bernard J. PITKOFF.

No. CV000373683.
|
Nov. 9, 2000.

MEMORANDUM OF DECISION RE: MOTION TO DISMISS (DOCKET ENTRY NO. 103)

SKOLNICK.

*1 Before the court is the defendants' motion to dismiss the plaintiff's complaint for lack of personal jurisdiction.[1] The plaintiff alleges the following facts in her complaint.[2] The plaintiff, Esther Steiman, retained the services of the defendants, Bernard Pitcoff, Bernard J. Pitcoff & Company and Jason Maxwell, Ltd., to represent her in a tax assessment appeal. The defendants live and operate their businesses within the state of New York. The plaintiff is a Connecticut resident. According to the plaintiff, the defendants solicited business from her by sending a letter to her at her residence in Connecticut. She also alleges that the defendants communicated with her on several occasions by sending letters to her in Connecticut. The plaintiff also alleges that she paid the defendants for services that they failed to perform, and that the defendants made several false misrepresentations to her regarding her tax matter. The plaintiff alleges that her tax appeal was eventually dismissed due to the defendants' neglect. She also alleges that she was damaged by the defendants' willful or wanton misconduct.

The defendants now move to dismiss the plaintiff's complaint on the ground that the court lacks personal jurisdiction over them. The defendants filed a memorandum of law in support of their motion together with an affidavit from Bernard Pitcoff. The plaintiff filed a memorandum in opposition to the defendants' motion together with her affidavit.

"It is well established that in ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Lawrence Brunoli, Inc. v. Branford*, 247 Conn. 407, 410–11, 722 A.2d 271 (1999). "Practice Book § [10–31] provides in pertinent part: The motion to dismiss shall be used to assert ... (2) lack of jurisdiction over the person ..." *Knipple v. Viking Communications, Ltd.*, 236 Conn. 602, 604 n. 3, 674 A.2d 426 (1996). "[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented ... and the court must fully resolve it before proceeding further with the case." (Citations omitted; internal quotation marks omitted.) *Castro v. Viera*, 207 Conn. 420, 429, 541 A.2d 1216 (1988).

"When a defendant files a motion to dismiss challenging the court's jurisdiction, a two-part inquiry is required. The trial court must first decide whether the applicable state long-arm statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) *Knipple v. Viking Communications, Ltd., supra*, 236 Conn. 606. "If a challenge to the court's personal jurisdiction is raised by a defendant, either by a foreign corporation or by a nonresident individual, the plaintiff must bear the burden of proving the court's jurisdiction." *Id.*, 607.

In the present case, the plaintiff purported to serve her complaint on the defendants pursuant to Connecticut's long-arm statute, General Statutes § 52–59b. The statute provides, in pertinent part: "(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, or foreign partnership ... who in person or through an agent: (1) Transacts business within the state ... or (3) commits a tortious act outside the state causing injury to person or property within the state ... if he (A) regularly does or solicits business, or engages in any other persistent course of conduct ... in the state ..." General Statutes § 52–59b.

*2 Taking the facts in the complaint as true and construing them in the light most favorable to the pleader, the plaintiff alleges a cause of action for professional malpractice. Her allegation that the defendants made false representations to her at her Connecticut residence, and that she was injured thereby, is sufficient to allege that the defendants engaged in tortious conduct which caused injury to her within Connecticut. "False representations entering Connecticut by wire or mail constitute tortious conduct in Connecticut ..." *Knipple v. Viking Communications, Ltd., supra,* 236 Conn. 610. Accordingly, the plaintiff has satisfied the statutory requirements for personal jurisdiction over the defendants.

The court must now determine whether the exercise of jurisdiction over the defendants would violate their right to due process. See *id.,* 606. "The twin touchstones of due process analysis under the minimum contacts doctrine are foreseeability and fairness. [T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (Internal quotation marks omitted.) *United States Trust Co. v. Bohart,* 197 Conn. 34, 41, 495 A.2d 1034 (1985); see also *Phoenix Leasing, Inc. v. Kosinski,* 47 Conn.App. 650, 654, 707 A.2d 314 (1998).

On the question of minimum contacts, the plaintiff alleges that the defendants had the following contacts with Connecticut:

The defendants solicited business from her at her Connecticut residence with their offer to represent her in her tax matter. On July 11, 1997, the defendants sent a letter to her at her Connecticut residence which contained false information regarding the actions of the Internal Revenue Service. On September 2, 1997, and January 27, 1998, the defendants sent letters to the plaintiff at her Connecticut residence which contained false information regarding the status of her tax case. These letters prompted her to pay the defendants to pursue an appeal of her tax case, although they failed to do so. On August 10, 1998, the defendants again sent a letter to the plaintiff at her Connecticut residence requesting more money for the appeal, an appeal they again failed to pursue. The plaintiff alleges that on December 20, 1999, the defendants sent her a letter at her Connecticut residence which contained false information regarding reasons why her tax case was not being appealed.

The defendants argue that they did not have sufficient contacts with the state of Connecticut to subject them to the jurisdiction of the state. The defendants further argue that the plaintiff contacted them in New York for a tax matter pending in New York. They contend that the plaintiff fails to allege that they came to Connecticut, performed any work in Connecticut or transacted any business in the state. It is undisputed, however, that all communications between the parties were by letter between the defendants' New York address and the plaintiff's Connecticut residence. This correspondence between the plaintiff and the defendants lasted over a decade. It is submitted that the plaintiff has alleged facts sufficient to show that the defendants had sufficient contacts with Connecticut for them to foresee or reasonably anticipate being sued here. See *Charlup v. Omnicorp Holdings, Inc.,* Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. 121184 (August 24, 1993) (Nigro, J.) (fact that defendant sent faxes, paychecks, and correspondence and made telephone calls to Connecticut supported finding of jurisdiction). Accordingly, the court finds that jurisdiction over the defendants is proper.

*3 Having satisfied the minimum contacts requirements, exercising jurisdiction over the defendants is proper unless such exercise would be unfair. See *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477–78, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Because the defendants have not shown that litigating this case in Connecticut would be so burdensome as to be unfair, the court's jurisdiction is proper. The defendants also argue that the case should be dismissed under the doctrine of forum non conveniens. However, the defendants failed to adequately brief this ground, and, therefore, the court will deem it abandoned. See *Emerick v. Kuhn,* 52 Conn.App. 724, 744, 737 A.2d 456, cert. denied, 249 Conn. 929, 738 A.2d 653, cert. denied, 528 U.S. 1005, 120 S.Ct. 500, 145 L.Ed.2d 386 (1999) (stating that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly ... Our Supreme Court has stated that [w]e are not required to review issues that have been improperly presented to [the] court through an inadequate brief." (Citations omitted; internal quotation marks omitted.)) Additionally, the "invocation of the doctrine of forum non conveniens is a drastic remedy ... which the trial court must approach with caution and restraint." (Citations omitted; internal quotation marks omitted.) *Picketts v. International Playtex, Inc.,* 215 Conn. 490, 501, 576 A.2d 518 (1990).

Therefore, the court declines to review this claim or dismiss the plaintiff's cause of action for forum non conveniens. Accordingly, the defendants' motion to dismiss is denied.

All Citations Not Reported in A.2d, 2000 WL 1838691

Footnotes

1 In the motion to dismiss the defendants state that the complaint should be dismissed for lack of subject matter jurisdiction, however, in their brief the defendants correctly argue that their motion is premised on lack of personal jurisdiction and improper venue.

2 The plaintiff filed an amended complaint on July 31st, 2000. However, because the amended complaint was filed more than thirty days after the original without filing a request for leave to file and the defendant objected to the filing of the amended complaint, the amended complaint does not become the operative pleading. Therefore, the original complaint is the operative pleading. See Practice Book. § 10–60.

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EXHIBIT 2

1997 WL 630022

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Ann ENDYKE
v.
John HAVERLY et al.

No. CV 970401549.
|
Oct. 1, 1997.

MEMORANDUM OF DECISION

PITTMAN, Judge.

*1 The plaintiff commenced this action against the defendants, who are neighboring landowners, alleging that the defendants had interfered with her use of her land. Service of process was accomplished on July 1, 1997. On August 1, 1997, thirty-one days later, the defendants filed an appearance by counsel and moved to dismiss the plaintiff's action, initially for two reasons: that the allegations of the plaintiff were not personally verified by her, and that no summons was issued along with the complaint.

On August 11, 1997, the plaintiff filed an affidavit verifying the allegations in the complaint and in the application for temporary injunction. Conn. Gen.Stat. Sec. 52-471(b) provides that no injunction may be issued unless the facts stated in the application are verified under oath. The court issued no injunction prior to August 11, and has as yet entered no orders against the defendants. The plain language of 52-471 prohibits the court from issuing an injunction if the verification is lacking, but it does not deprive the court of jurisdiction to entertain the lawsuit or to issue process to defendants. The lack of an oath can be and was in this case cured by the affidavit of the plaintiff.

The plaintiff admits that no summons form such as Conn. Prac. Bk. Form 103.1 (JD-CV-1) was served on the defendants. The plaintiff argues that the Order to Show Cause with which the defendants were served is a valid substitute to the more traditional summons form.

Conn. Gen.Stat. Sec. 52-45a provides:

> Civil actions shall be commenced by legal process consisting of a writ of summons or attachment, describing the parties, the court to which it is returnable, the return day and the date and place for the filing of an appearance. The writ shall be accompanied by the plaintiff's complaint. The writ ... shall be signed by a commissioner of the Superior Court or a judge or clerk of the court to which it is returnable.

Conn. Prac. Book Sec. 49 provides:

> Mesne process in civil actions shall be a writ of summons or attachment, describing the parties, the court to which it is returnable and the time and place of appearance, and shall be accompanied by the plaintiff's complaint. Such writ ... shall be signed by a commissioner of the superior court or a judge or clerk of the court to which it is returnable. Except in those actions and proceedings indicated below, the writ of summons shall be on a form substantially in compliance with ... Form JD-CV-1.

In certain circumstances, courts have held that the traditional form of process need not be used as long as the elements of a writ of summons are otherwise contained in a paper properly served on the defendant. In *McQuillan v. Department of Liquor Control*, 216 Conn. 667, 583 A.2d 633 (1990), the petitioners filed an appeal from the action of an administrative agency and filed an application for an

injunction preventing the agency from taking certain actions against the petitioner. The petitioner did not use a preferred summons form for the institution of an administrative appeal. The Supreme Court held that in an attempt to simultaneously file the appeal *and* request a temporary injunction, the show cause order on the injunction summoning the defendant to court was alone sufficient. Although the show cause order, on its face, did not expressly direct the defendant to appear in, or to answer, the plaintiff's administrative appeal, the court held that

***2** [i]f the form ... clearly apprises all concerned that a lawsuit is being instituted, and contains notice of the return date, and the requirement for filing an appearance, and also directs a competent authority to summon the defendant, then the policy of giving notice to the defendant of the nature of the proceedings has been served ... Absent an affirmative showing of prejudice by the defendant ... the mistaken use of [a form] does not warrant the dismissal of an administrative appeal.

Id., at 672-73, 583 A.2d 633.

More recent authority suggests that the failure to adhere strictly to all the requirements of the statute and Practice Book concerning mesne process is fatal to the assumption by the court of subject matter jurisdiction. In *Hillman v. Greenwich*, 217 Conn. 520, 587 A.2d 99 (1991), the court held that in an action for damages and injunctive relief, service of the complaint on the defendant without any form of a summons at all failed to confer jurisdiction on the court and could not be cured by an amended complaint subsequently served with a proper summons in the same action.

These two leading cases, decided less than three months apart, require this court to analyze to which of those cases the current situation is most analogous. *McQuillan* is notable for its holding that a proper summons to appear at, essentially, a *pendente lite* proceeding that is part of the main lawsuit can also be deemed to be notice of the main lawsuit sufficient to confer subject matter jurisdiction. The citation in the *McQuillan* case was also, however, the Superior Court phase of an ongoing controversy, see, e.g., *Goodman v. Bank of Boston Connecticut*, 27 Conn.App. 333, 339, 606 A.2d 994 (1992), that had already been the subject of a set of administrative proceedings pursuant to statute under the Uniform Administrative Procedure Act. As an appeal to the Superior Court rather than the initiation of a free-standing civil proceeding, the requirements to confer jurisdiction on the court sprang not from the statutes and rules requiring the use of mesne process, but from a separate set of statutory dictates in the UAPA, Conn. Gen. Stats. Sec. 4-183 et seq. Moreover, Conn. P.B. Sec. 49 specifically exempts administrative appeals from the requirements to use a summons form substantially like JD-CV-1 in the commencement of the action.

The plaintiff's civil action here is founded on the complaint containing five counts. In the prayer for relief, the plaintiff asks the court for a temporary and permanent injunction, money damages and attorney fees. No summons accompanied the complaint, although an order to show cause notified the defendants of a hearing on the application for a temporary injunction and summoned them to it. The defendants were never summoned to court to appear and to answer the allegations in the complaint.

***3** The failure to initiate a civil lawsuit through the use of mesne process deprives the court of jurisdiction.[1] For this reason the motion to dismiss is granted.

All Citations

Not Reported in A.2d, 1997 WL 630022, 20 Conn. L. Rptr. 414

Footnotes

1 Accord, *Howard v. Robertson*, 27 Conn.App. 621, 626-27, 608 A.2d 711 (1992).

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EXHIBIT 3

2001 WL 1378782
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

In re NATANE D.

Oct. 2, 2001.

Memorandum of Decision on Motion to Dismiss

DAVID GOLD, J.

*1 This court has been asked to dismiss the above-entitled action in which Eric I. (the "appellant"), seeks to appeal from a decision of the Meriden Probate Court. Arguments on the motion were presented to this court on September 11, 2001 and September 20, 2001. After due consideration of these arguments and after a review of relevant statutes and case law, the court hereby grants the motion to dismiss.

The following facts and procedural history are not in dispute. On March 22, 2001, the appellant moved the Meriden Probate Court (the "Probate Court") to reopen its September 9, 1998 judgment which had terminated the appellant's parental rights to his minor child, Natane I. The Probate Court denied the appellant's motion on April 12, 2001. The appellant thereupon filed with the Probate Court a Motion For Appeal From Probate. On April 27, 2001, the Probate Court granted the appellant's motion to appeal and issued a decree allowing the appeal (the "decree"). The decree expressly directed the appellant to have a proper officer serve attested copies of the decree and the Motion for Appeal upon two interested parties: (1) Irene M., the mother of the minor child, Natane, and the petitioner in the 1998 Probate Court proceedings which terminated appellant's parental rights; and (2) Thomas Noonan, the attorney who had appeared in the Probate Court as counsel for the minor child during the 1998 termination of parental rights proceedings. The decree also directed that service on these identified parties was to be made "in the manner prescribed for the service of civil process."

Upon learning that the Probate Court had acted, the appellant obtained the decree from the Probate Court, and filed it, along with the Motion For Appeal from Probate and the statutorily required bond, with the clerk of this court. Notwithstanding the terms of the decree, the appellant did not, either prior to or after filing these documents, serve the appeal on Ms. M. or Mr. Noonan. Thereafter, counsel for the minor child and for Ms. M., each of whom had become aware of this action when it was docketed by the clerk, appeared before this court and jointly argued that this appeal must be dismissed. These parties claim that dismissal is warranted for two reasons: first, because the action was never served upon them, and second, because the action is barred by C.G.S. § 45a-187, which places strict time limits on the filing of appeals from probate court judgments.[1]

In order to resolve the issue raised in the first of these claims, the court must determine whether this action, which was never served upon the parties identified in the decree, is in compliance with the requirements and conditions which our law places upon one who seeks to appeal from a decision of probate. In making this determination, the court must keep in mind that "[t]he right to appeal from the decision of a Probate Court is purely statutory, and the requirements fixed by statute for taking and prosecuting the appeal must be met." *State v. Goggin*, 208 Conn. 606, 615 (1988). The court must also recognize that it is "without jurisdiction to entertain an appeal from probate unless the appeal complies with the conditions designated by statute as essential to the exercise of this power." *Bergin v. Bergin*, 3 Conn.App. 566, 568, *cert. denied*, 196 Conn. 806 (1985).

*2 Upon examination of the applicable statutes and case law, the court concludes that an appeal from probate must be served on those parties identified in the probate decree allowing the appeal, and that, consequently, the appeal here is statutorily deficient in this respect. The court's conclusion arises from the fact that "a probate appeal is considered a civil action for the purposes of mesne process." *Kucej v. Kucej*, 34 Conn.App. 579, 583 (1994); *Bergin*, 3 Conn.App. at 568.[2] Few of the requirements of mesne process are of any greater importance than that which mandates a proper officer to make service of the action by "leaving a true and attested copy of [such process] ... with the defendant, or at his usual place of abode." C.G.S. § 52-57. In fact, service of process is of such significance that an action "is not commenced until

process is actually served upon the defendant," *Rana v. Ritacco,* 236 Conn. 330, 338 (1996) (citations omitted), and "unless service of process is made as the statute prescribes, the court ... does not acquire jurisdiction." *Hyde v. Richard,* 145 Conn. 24, 25 (1958).

It is undisputed that the appeal here did not comply with this requirement of mesne process. The appellant conceded at oral argument that he did not have the appeal served-by in-hand or abode service, by mail or by any other means-to any person at any time. In such a situation, our Supreme Court, referring specifically to the service of an appeal from probate, has held that "the failure ... to give proper notice of the appeal, [is an] irregularit[y] which make[s] the appeal voidable [and subject to] a plea in abatement," *Fuller v. Marvin,* 107 Conn. 354, 357 (1928)-a plea which has been replaced in today's practice by the motion to dismiss. *Grant v. Bassman,* 221 Conn. 465, 473 n. 6. See also *Durkin v. Durkin,* 24 Conn. L. Rptr. 291, 1999 Ct.Sup. 4520 (April 7, 1999) (Lewis, J.) (appeals from probate must comply with the requirements of mesne process in the sense of returning the process to court within certain time periods and *(in) the manner of service,* i.e. in-hand or abode") (italics added).

Our Appellate Court has also recognized that appeals from probate are "voidable" where a violation of mesne process requirements has occurred. In *Bergin, supra,* and *Kucej, supra,* the court considered whether a dismissal was appropriate where an appeal from probate, although properly and timely served, was not returned to the Superior Court at least six days before the return date, in violation of the requirement of mesne process set forth in C.G.S. § 52-46a. The *Bergin* court held that "late return of process renders an action voidable" and found no error in the trial court's dismissal of the appeal. *Bergin,* 3 Conn.App. at 569. *Kucej* agreed with the *Bergin* holding, but found that the Kucej appeal had been timely returned to court. Given that dismissal was deemed warranted in these cases even where such a "technical" violation of mesne process was at issue, dismissal would seem equally appropriate where the violation at issue involves a wholesale failure to serve process.

***3** As noted, the requirement of service goes to the very heart of mesne process and is essential to the court's jurisdiction. This is not a case where the appellant directed that service be made, but its manner or timing was in some way technically defective. Rather, the case here involves a situation where, notwithstanding the long-held principle that "an action is not commenced until process is actually served upon the defendant," *Rana,* 236 Conn. at 338, no service was made, or was even attempted to be made, by any means or at any time. The court is therefore confronted not with a mere procedural defect, but with a substantive flaw which implicates the jurisdiction of the court.[3]

This court is not unmindful of the fact that the appellant appears *pro se* and claims that he was led to believe by court personnel that he had done all that was procedurally necessary to perfect his appeal when he filed the decree, the Motion for Appeal and the bond with the Superior Court. But it bears repeating that "the right to appeal from a decision of a Probate Court is purely statutory, and the requirements fixed by statute for taking and prosecuting the appeal must be met." *Goggin,* 208 Conn. at 615. Absent such statutory compliance, "the Superior Court is without jurisdiction to entertain [the] appeal from probate." *Bergin,* 3 Conn.App. at 568.

As a result, even if the court were to accept the appellant's unsubstantiated representation that he was misled by court personnel, the jurisdictional question raised here could not be overlooked. As our Supreme Court has noted, "[w]hile the trial court can show some degree of leniency toward a party when there is evidence that it was misguided by court personnel, the court cannot disregard established and mandatory requirements which circumscribe jurisdiction in the first instance." *Tarnopol v. Connecticut Siting Council,* 212 Conn. 157, 165 (1989) *quoting Basilicato v. Dept. of Public Utility Control,* 197 Conn. 320, 324 (1985) ("There are no special rules authorizing a lesser standard of compliance for *pro se* parties"). In an appeal from probate, compliance with the statutes governing mesne process is one of the "established and mandatory requirements which circumscribe jurisdiction" of this court. By failing to serve this appeal in the manner directed by the probate decree, the appellant disregarded the requirements of mesne process. This action is therefore voidable. "Since the defendants, in this case, chose not to waive this defect and timely filed a motion to dismiss, the trial court properly dismiss[es] the appeal." *Bergin,* 3 Conn.App. at 568.

WHEREFORE, the motion to dismiss is hereby granted.[4]

All Citations

Not Reported in A.2d, 2001 WL 1378782

Footnotes

1 C.G.S. § 45a-187 provides, in pertinent part, that appeals from probate court judgments terminating parental rights must be taken within thirty days, or, under some circumstances, ninety days, of the date of the judgment.

2 "Mesne process consists of a writ of summons, which describes the parties, the court to which the writ is returnable, and a return date," *Kucej,* 34 Conn.App. at 583 n. 4.

3 Also implicating the court's jurisdiction is the fact that the appellant, perhaps because he did not seek to have the appeal served, failed to assign this appeal a return date. Just as service of process is necessary to commence a civil action, so too is the designation of a return date on the action. C.G.S. § 52-45a. A return date is essential to the validity of an action because "both the time within which process must be served after its issuance and the time within which the writ must be filed with the court after service are determined by reference to [this date]." *Raynor v. Hickock Realty Corp.,* 61 Conn.App. 234, 242 (2000). For this reason, the return date has been held "a necessary component of a writ by which a civil action is commenced." *Id.*
While the court recognizes that an improper return date may be corrected under certain circumstances, C.G.S. § 52-72, and a motion to dismiss may be denied where an incorrect return date results from a probate court error, see *In re Michaela Lee R.,* 253 Conn. 570, 606-07 (2000), this case does not involve merely an improper return date. What is at issue here is an appeal which sets no return date at all. This is an important distinction because, unlike an improper return date, "[t]he absence of a return date on the writ, whether the fault of a plaintiff or a court clerk, is unforgivable." *Raynor,* 61 Conn.App. at 242. Given that *Bergin* and *Kucej,* as well as *Durkin v. Durkin,* 24 Conn. L. Rptr. 291, 1999 Ct.Sup. 4520 (April 7, 1999) (Lewis, J.) and *Amore v. Estate of Amore,* 26 Conn. L. Rptr. 604, 2000 Ct.Sup. 4813 (April 26, 2000) (Moraghan, J.), hold that dismissal is appropriate where a probate appeal is not returned to court at least six days before the return date, then dismissal would certainly be warranted where, as here, an appellant fails to designate a return date, and thereby renders compliance with this six day requirement incapable of being determined, and the requirement itself utterly meaningless.

4 Although the court need not reach the second question posed by the motion to dismiss-whether the time limits contained in C.G.S. § 45a-187 should operate as a bar to this appeal-it is appropriate to summarize briefly the substance of this claim. Under C.G.S. § 45a-187, the appellant would have had only thirty days to appeal to this court from the original judgment of the Probate Court terminating his parental rights. The appellant did not file an appeal of this September 9, 1998 judgment. What the appellant has done over the last three years is to file with the probate court three motions to reopen the judgment pursuant to C.G.S. § 45a-719. It is court's understanding that each of these motions has raised substantially the same claim and has sought review of the circumstances surrounding the original probate court judgment. Each motion has been denied by the Probate Court. The appellant did not appeal from either of the first two denials. The instant appeal is taken from the denial of the third motion to reopen.
The claim advanced by the motion to dismiss is that the appellant, having failed to pursue a direct appeal of the judgment, should be precluded now-three years after judgment-from raising claims that he could have brought on appeal-particularly where these claims have already been the subject of two unsuccessful motions to reopen, neither of which was appealed.

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EXHIBIT 4

2004 WL 1098808
Only the Westlaw citation is currently available.

Superior Court of Connecticut,
Judicial District of New Haven.

Deborah A. VISSICCHIO, et al.
v.
David L. GREENSPAN, et al.

No. CV030480706S.
|
May 3, 2004.

Attorneys and Law Firms

Roger Frechette, New Haven, for Deborah A. Vissicchio and Concetta C. Mastriano.

Riccio & Beletsky LLC, East Haven, for David L. Greenspan.

Pickett James M Law Offices, Rocky Hill, for Kelly Moffat and Greg Moffat.

Opinion

ARNOLD, J.

*1 The plaintiff, Deborah A Vissicchio has filed a motion to dismiss the defendant, David L. Greenspan's apportionment complaint for a lack of subject matter jurisdiction, due to the insufficiency of process of said apportionment complaint.

This is a personal injury action resulting from a chain reaction motor vehicle accident on September 1, 2001. The plaintiff alleges that she was operating her motor vehicle behind a line of traffic which had come to a halt on the highway when her motor vehicle was struck from behind by the defendant Greenspan. This caused the plaintiff's vehicle to collide with the vehicle directly in front of her. The plaintiff claims the collision, set in force by the defendant Greenspan, resulted in personal injuries to the plaintiff and her passenger, Consetta Mastriano. The plaintiff and her passenger, Mastriano entered suit on July 28, 2003, naming Greenspan as a defendant. They also named Kelly and Greg Moffat as co-defendants. Kelly and Greg Moffat were the operator and owners of a vehicle which struck the rear of the Greenspan vehicle, causing the Greenspan vehicle to then collide with the plaintiff Vissicchio's vehicle.

On September 30, 2003, counsel for Greenspan filed what is purported to be an apportionment complaint against Vissicchio for the purposes of apportioning liability against Vissicchio as to the claims asserted by the plaintiff passenger Consetta Mastriano.

The plaintiff Vissicchio, in filing the motion to dismiss, asserts that the apportionment complaint is defective in that it was not accompanied by a writ of summons pursuant to General Statutes § 52-45a, which states in relevant part that, "[c]ivil actions shall be commenced by legal process consisting of a writ of summons or attachment, describing the parties, the court to which it is returnable, the return day, the date and place for the filing of an appearance and information required by the Office of the Chief Court Administrator. The writ shall be accompanied by the plaintiff's complaint ..." The plaintiff Vissicchio argues that the lack of a return date is fatal to the apportionment complaint.

Vissicchio also argues that the defendant's apportionment complaint is in violation of General Statutes § 52-102b also requires a writ, summons and complaint bearing a return date to be served on all parties to the original action. Thus, once again, the lack of a return date is claimed to be fatal to the court's subject matter jurisdiction. General Statutes § 52-102b reads in relevant part as follows:
(a) A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability.

Any such writ, summons and complaint, hereinafter called the apportionment complaint, shall be served within one hundred twenty days of the return date specified in the plaintiff's original complaint. The defendant filing an apportionment complaint shall serve a copy of such apportionment complaint on all parties to the original action in accordance with the rules of practice of the Superior Court on or before the return date specified

in the apportionment complaint. The person upon whom the apportionment complaint is served, hereinafter called the apportionment defendant, shall be a party for all purposes, including all purposes under section 52-572h.

*2 (b) The apportionment complaint shall be equivalent in all respects to an original writ, summons and complaint, except that it shall include the docket number assigned to the original action and no new entry fee shall be imposed. The apportionment defendant shall have available to him all remedies available to an original defendant including the right to assert defenses, set-offs or counterclaims against any party.

(d) Notwithstanding any applicable statute of limitation or repose, the plaintiff may, within sixty days of the return date of the apportionment complaint served pursuant to subsection (a) of this section, assert any claim against the apportionment defendant arising out of the transaction or occurrence that is the subject matter of the original complaint.

(e) When a counterclaim is asserted against a plaintiff, he may cause a person not a party to the action to be brought in as an apportionment defendant under circumstances which under this section would entitle a defendant to do so.

(f) This section shall be the exclusive means by which a defendant may add a person who is or may be liable pursuant to section 52-572h for a proportionate share of the plaintiff's damages as a party to the action.

Vissicchio argues that while a defective return date can be cured if there is a return date on the writ of summons, the defendant Greenspan cannot cure it in the present case because the lack of a return date is due to the fact that there is no writ of summons attached to the apportionment complaint. The apportionment complaint was simply mailed to Vissicchio's counsel, the same as one would do with any pleading pursuant to Practice Book § 10-12 through § 10-14. The plaintiff also argues that as a result of the lack of a return date, the plaintiff passenger, Mastriano cannot assert a claim against the apportionment defendant within sixty days of the return date of the apportionment complaint, as set forth in General Statutes § 52-102b(d), should the passenger elect to pursue such a course of action, "as there is no apportionment complaint to plead over." The plaintiff Vissicchio submits that the purported apportionment complaint filed by the defendant Greenspan is a nullity and requests that the court dismiss it for a lack of subject matter jurisdiction.

The defendant Greenspan in his objection to the motion to dismiss, argues that it is permissible to file an apportionment complaint against an existing party to an action, and therefore, an apportionment complaint filed against an existing party to an action does not require a writ of summons. He argues in the alternative, that even if General Statutes § 52-102b requires service of a summons on an existing party, that as an apportionment plaintiff he has filed a motion to amend his apportionment complaint simultaneously with his objection, and the motion to amend attaches to it a writ of summons. This, Greenspan argues, effectively cures any defect, to the extent one existed, therefore complying with § 52-102b. Greenspan admits that service of the original apportionment complaint was filed on Vissicchio's attorney by first class mail pursuant to Practice Book § 10-12. The plaintiff Vissicchio has objected to the defendant Greenspan's attempt to amend the apportionment complaint by way of a first amended apportionment complaint or a second amended apportionment complaint.

*3 The defendant Greenspan, the apportionment plaintiff, claims that an apportionment complaint can be filed against an existing party to an action. See *Torres v. Begic,* Superior Court, judicial district of New Haven, Docket No. 423742 (June 13, 2000, Levin J.) (27 Conn. L. Rptr. 403); *Farmer v. Christianson,* Superior Court of Tolland at Rockville, Docket No. CV 00 71954 May 4, 2000, Sullivan, J.) (27 Conn. L. Rptr. 196); *Sharif v. Peck,* Superior Court, judicial district of New Haven at New Haven, No. 429034 (March 27, 2001) (Blue, J.) (29 Conn. L. Rptr. 311). Thus, a writ of summons bearing a return date, is not required.

There is a split of authority among superior court judges on this issue, but the majority of decisions of the superior court hold that § 52-102b does not permit the filing of an apportionment complaint against persons already party to an action. See *DiLorenzo v. Reardon,* Superior Court, judicial district of Waterbury, Docket No. 12839 (May 15, 1996) (Murray, J.) (16 Conn. L. Rptr. 587); *Adams v. Crowder,* Superior Court, judicial district of New Haven at New Haven, Docket No. 356975 (August 3, 1995) (Zoarski, J.); *Voog v. Lindsay,* Superior Court, judicial district of Waterbury, Docket No. 313610 (March 22, 1994) (Flynn, J.) (11 Conn. L. Rptr. 169); *Miano v. Bazzano,* Superior Court, judicial district of Hartford New Britain at Hartford, Docket No. 510509 (January 27, 1993) (Hale, J.T.R.) (8 Conn. L. Rptr. 284); *Algea v. Barnett,* Superior Court, judicial district of Fairfield, Docket No. 334396 (July 17, 1997) (Skolnick, J.) (20 Conn. L. Rptr. 100); *Cullen v. Czaikowski,* Superior Court, judicial District of New Haven at New Haven, Docket No. 417339 (April 12, 1999) (Jones, J.) (24 Conn. L. Rptr. 357); *Apicelli v. Indian Nations,* Superior Court,

judicial district of New London at Norwich, Docket No. 119305 (December 11, 2000) (Martin, J.); *Rubbak v. Thompson,* Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. 0180009 (April 6, 2001) (Lewis, J.) (29 Conn. L. Rptr. 316); *Pryce v. Keane,* Superior Court, judicial district of Hartford at Hartford, Docket No. 0806961 (July 20, 2001) (Berger, J.); *Demosthene v. Spignolio,* Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. 0186792 (July 24, 2002), discussing misplaced reliance on *Donner v. Kearse,* 234 Conn. 660, 662 A.2d 1269 (1995); *Evans v.. Spinelli,* Superior Court, judicial district of New Haven at Meriden, Docket No. 0279651 (February 10, 2003) (Wiese, J.) (34 Conn. L. Rptr. 52); *Ayalon v. Breakstone,* Superior Court, judicial district of Ansonia-Milford at Milford, No. CV02 078878 (Dec. 5, 2003) (Cremis, J.).

While the court agrees with the majority of superior court judges and the plaintiff, that the apportionment complaint is not permitted, the court must address the issues raised by the motion to dismiss as the motion to dismiss challenges the court's subject matter jurisdiction. "Once the question of lack of jurisdiction is raised, [it] must be disposed of no matter in what form it is presented ... and the court must fully resolve it before proceeding further with the case." *Figueroa v. C & S Ball Bearing,* 237 Conn. 1, 4, 675 A.2d 845 (1996). A motion to strike is the appropriate motion to attack the legal sufficiency of the complaint, while the motion to dismiss challenges the court's subject matter jurisdiction.

***4** Before proceeding further the court reviews the relevant standard of law when entertaining a motion to dismiss. A motion to dismiss shall be used to assert (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person and (3) improper venue. "A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." *Richardello v. Butka,* 45 Conn.Sup. 336, 717 A.2d 298, 18 Conn. L. Rptr. 409 (1997); *Gurliacci v. Mayer,* 218 Conn. 531, 544, 590 A.2d 914 (1991). "A motion to dismiss is used to assert jurisdictional flaws that appear on the record or are alleged by the defendant in a supporting affidavit as to facts not apparent on the record." *Villager Pond, Inc. v. Darien,* 54 Conn.App. 178, 182, 734 A.2d 1031 (1999); *Bradley's Appeal from Probate,* 19 Conn.App. 456, 461-62, 563 A.2d 1358 (1989). "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Villager Pond, Inc. v. Darien, supra,* 54 Conn.App. at 183; *Mahoney v. Lensink,* 213 Conn. 548, 567, 569 A.2d 518 (1990).

The question of whether an apportionment complaint can be served on an opposing counsel by mail without the necessity of serving the actual party with a writ summons and complaint bearing a proper return date is a matter of statutory interpretation. The rules regarding statutory interpretation are well-settled. The court must approach the questions raised regarding the interpretation of statutes according to the well-established principles of statutory construction designed to further the fundamental objective of ascertaining and giving effect to the apparent intent of the legislature. *State v. Kozlowski,* 199 Conn. 667, 673, 509 A.2d 20 (1986). The court must look to the words of the statute; to the legislative history; the circumstances surrounding its enactment; to the legislative policy it was designed to implement; and to its relationship to existing legislation and any common-law principles governing the same subject matter. *Dart & Bogue Co. v. Slosberg,* 202 Conn. 566, 572, 522 A.2d 763 (1987); *Texaco Refining & Marketing Co. v. Commissioner,* 202 Conn. 583, 589, 522 A.2d 771 (1987); *State v. Jason B.,* 248 Conn. 543, 729 A.2d 760 (1999).

With any issue of statutory interpretation, our initial guide is the language of the statute itself. *Frillici v. Westport,* 231 Conn. 418, 430-32, 650 A.2d 557 (1994). If its language in drafting and enacting a statute is clear and unambiguous, there is no room for alteration of the legislative decision by the judicial branch. *Ambriose v. William Raveis Real Estate, Inc.,* 226 Conn. 757, 764-65 (1993). It is assumed that the words themselves express the intent of the legislature. *Mazur v. Blum,* 184 Conn. 116, 118-19, 441 A.2d 65 (1981). "A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity." *State v. Perruccio,* 192 Conn. 154, 163 n. 4, 471 A.2d 632 CT Page 7581 (1984).

***5** "A corollary of the above rule of construction is that the intent of the legislature is to be found not in what the legislature meant to say, but in the meaning of what it did say." *Burnham v. Administrator,* 184 Conn. 317, 325, 439 A.2d 1008 (1981). The words used in statutes "shall be construed according to the commonly approved usage of the language." *Simmonette v. Great American Ins. Co.,* 165 Conn. 466, 471, 338 A.2d 453 (1973); *Caulkins v. Petrillo,* 200 Conn. 208, 215-16, 510 A.2d 1329 (1986).

The court also notes the legislature's recent passage of Public Act 03-154, which reaffirms that the meaning of a statute, first, shall be ascertained from the text of the

statute and its relationship to other statutes. "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." *Id.*

General Statutes § 52-102b clearly requires that an apportionment complaint filed pursuant to § 52-572h be initiated by service of a writ summons and complaint upon a person *not a party to the action* . (Emphasis added.) All parties to the original action may be served in accordance with the rules of practice of the superior court "on or before the return date specified in the apportionment complaint." Thus, the only apportionment complaint that could have been served on Vissicchio's counsel by mail in accordance with Practice Book § 10-12 through § 10-14 would be an apportionment complaint filed against a non-party. General Statutes § 52-102b does not permit an apportionment complaint pursuant to § 52-572h to be filed against a present party to an action, and by its unambiguous language requires proper mesne service,[1] including a return date, when an apportionment complaint is initiated against a non-party.

Despite this court's view that an apportionment complaint cannot be filed against a present party to an action, the court recognizes that there is a split of authority in the superior court regarding this question. However, even if the court viewed this in a light most favorable to the defendant Greenspan, who is also, the apportionment plaintiff and allowed the apportionment complaint to be filed against a party to an action, the necessity of service of the apportionment complaint on Vissicchio by writ and summons, bearing a return date, would be required pursuant to § 52-102b. To allow otherwise, would jeopardize the plaintiff passenger Mastriano's ability to assert a claim against the apportionment defendant (Vissicchio) within 60 days of the return date of the apportionment complaint as set forth in § 52-102b(d).

In *Southern New England Telephone v. Board of Tax Review,* the court held that, "[a] proper citation, in accordance with General Statutes § 52-45a, is a document that, in addition to describing the parties, the court to which it is returnable, the return date and the date and place for filing an appearance, is signed by a commissioner of the superior court or a judge or clerk of the court to which it is returnable." *Id.*, at 162.

***6** In *Danzinger v. Shanknaitis,* 33 Conn.App. 6, 632 A.2d 1130 (1993), the court held, "[A]n improperly specified return date affects the court's jurisdiction ... [An] incorrect return date should not be viewed lightly. The defect of an improper return day is a defect which could not be corrected at all until [General Statutes] § 52-72 was enacted ... [I]t is the actual return of the writ to the court which really puts the action before the court and empowers the court to proceed ... Until such time as a proper return is made to the court, it lacks jurisdiction to consider the matter." (Citation omitted; internal quotation marks omitted.) *Id.*, at 10.

In *Minor v. Town of Manchester,* Superior Court, Judicial District of Hartford-New Britain at Hartford, Docket No. 523280 (January 31, 1995, Corradino, J.), the court held that failure to include a return date denied the court subject matter jurisdiction.

The court also determines that the jurisdictional defect cannot be cured by the filing of an amended complaint or a second amended complaint as Greenspan has attempted to do. General Statutes § 52-123[2] regarding circumstantial defects provides no remedy for the failure to attach any writ of summons to a complaint and to serve it in accordance with § 52-102b. It follows that the lack of a writ of summons in this matter also resulted in the lack of any return date.

Similarly, the provisions of General Statutes § 52-72[3] regarding amendment of process provides no relief to the defendant Greenspan. This is not a situation where the civil process was returnable to the wrong return date or for some other reason was defective. There was no service of process by writ and summons to be amended. If process is to be amended, it would still need to be served in the same manner as other civil process, and not simply by filing it with the court.

Accordingly, for the reasons set forth herein, the plaintiff Vissicchio's motion to dismiss the defendant Greenspan's apportionment complaint for lack of subject matter jurisdiction is hereby granted. The motion to amend the apportionment complaint dated October 31, 2003 is denied, as well. The second amended apportionment complaint dated November 19, 2003, attached to a writ and summons, bearing a return date of December 30, 2003, was mailed to Vissicchio's counsel and suffers from the same procedural flaws. Thus, the court enters an order dismissing it, as well as the court continues to lack subject matter jurisdiction, for the same reasons as set forth herein.

All Citations

Not Reported in A.2d, 2004 WL 1098808

Footnotes

1 Sec. 52-45a. (Formerly Sec. 52-89). Commencement of civil actions.
Civil actions shall be commenced by legal process consisting of a writ of summons or attachment, describing the parties, the court to which it is returnable, the return day, the date and place for the filing of an appearance and information required by the Office of the Chief Court Administrator. The writ shall be accompanied by the plaintiff's complaint. The writ may run into any judicial district and shall be signed by a commissioner of the Superior Court or a judge or clerk of the court to which it is returnable.

2 Sec. 52-123. Circumstantial defects not to abate pleadings.
No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court.

3 Sec. 52-72. Amendment of process.
(a) Any court shall allow a proper amendment to civil process which has been made returnable to the wrong return day or is for any other reason defective, upon payment of costs taxable upon sustaining a plea in abatement.
(b) Such amended process shall be served in the same manner as other civil process and shall have the same effect, from the date of the service, as if originally proper in form.
(c) If the court, on motion and after hearing, finds that the parties had notice of the pendency of the action and their rights have not been prejudiced or affected by reason of the defect, any attachment made by the original service and the rights under any lis pendens shall be preserved and continued from the date of service of the original process as though the original process had been in proper form. A certified copy of the finding shall be attached to and served with the amended process.

End of Document

EXHIBIT 5

1998 WL 161166
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Asha SODHI
v.
NATIONWIDE MUTUAL INSURANCE

No. CV 960564554.
|
March 10, 1998.

Defendant's Motion for Judgment of Dismissal

MULCAHY.

*1 On September 30, 1996, the plaintiff, Asha Sodhi, acting pro se, filed a complaint against the defendant, Nationwide Mutual Ins. Co., which the defendant moved to dismiss on the ground that the return date was improper. On October 28, 1996, the court, Wagner, J., ordered the granting of the defendant's motion to dismiss unless the plaintiff properly amended the return date within three weeks.[1] On November 4, 1996, the plaintiff moved to amend the return date with a notarized "Certification of Service" in which the plaintiff certified that a copy of the motion and accompanying papers were sent by certified mail to the defendant's attorney. This court found that it was unclear whether the plaintiff intended this November 4, 1996 filing to serve as her complaint with an amended return date; therefore, being particularly solicitous of the rights of pro se litigants, the court allowed the plaintiff a second opportunity to correct the defective service. The court treated the plaintiff's filing as a motion for an order to amend her complaint and to correct the return date. It was ordered that "unless plaintiff properly amends the return date of her complaint in accordance with General Statutes Section 52-48, and properly serves defendant in compliance with General Statutes Section 52-50, 52-57, and 52-72, within four (4) weeks of the date hereof, the defendant's motions ... are to be granted, dismissing this action." (Ruling Re: Motion for Order to Amend Return Date and Defendant's Objection, May 6, 1997, Mulcahy, J.) On May 13, 1997, the plaintiff served the corrected complaint upon the attorney representing the defendant corporation, who took the process under protest that he was not the corporation's agent for service.

General Statutes § 52-57(c) provides that: "In actions against a private corporation, service of process shall be made either upon the president, the vice president, an assistant vice president, the secretary, the assistant secretary, the treasurer, the assistant treasurer, the cashier, the assistant cashier, the teller or the assistant teller or its general or managing agent or manager or upon any director resident in this state, or the person in charge of the business of the corporation or upon any person who is at the time of service in charge of the office of the corporation in the town in which its principal office or place of business is located. In actions against a private corporation established under the laws of any other state, any foreign country or the United States, service of process may be made upon any of the aforesaid officers or agents, or upon the agent of the Corporation appointed pursuant to section 33-922."[2] If the defendant qualifies as a foreign corporation, General Statutes §§ 33-926, 33-929, 38a-25, and 38a-26 are controlling.[3]

"When a person-upon whom service is to be made is designated by statute, service upon any other person as a purported representative is inadequate." *Nelson v. Stop & Shop Cos.*, 25 Conn.App. 637, 641, 596 A.2d 4 (1991); see also *Tarnopol v. Connecticut Siting Council*, 212 Conn. 157, 163 fn. 8, 561 A.2d 931 (1989). "Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction. When the particular officers or employees of a corporation upon whom service may be made are designated, service upon any other person as a representative of the corporation is inadequate to confer jurisdiction upon the court to which the process is returnable." *Hyde v. Richard*, 145 Conn. 24, 25-26, 138 A.2d 527 (1958). "In general ... an attorney is not authorized by general principles of agency to accept service of original process or behalf of a client." *George v. Delpo*, Superior Court, judicial district of Waterbury, Docket No. 124137, 18 CONN.L.RPTR. 519 (January 2, 1997) (Pellegrino, J.). "Acceptance of service of process by an attorney on behalf of another person cannot be effective unless the attorney has specific authority from that person. A plaintiff has the burden of establishing that the authority to receive process exists between the defendant and the person served." *Keith v. Mellick &*

Sexton, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 552399 (April 2, 1996) (Wagner, J.); see also *Jambor v. Bissett,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 330384 (June 24, 1996) (Maiocco, J.) (17 CONN.L.RPTR. 115) (the court found no merit in the plaintiff's argument that the defendant's attorney, who was not an employee in defendant's business, was in charge of the business of the plaintiff's claim against the defendant; thus, it held that the attorney was not a proper person to accept service). The burden of proving whether the person served meets the criteria required by the statute is on the plaintiff. *Nelson v. Stop & Shop Cos., supra,* 25 Conn.App. 637, 642, 596 A.2d 4.

***2** General Statutes § 52-57(c) does not provide for service upon an attorney. There exists no statutory authority permitting the method of service attempted by the plaintiff. The plaintiff did not offer evidence indicating that the defendant specifically conferred agent status upon the attorney, served at her direction, by the sheriff. The plaintiff makes no claim of service upon the corporation's statutory agent for service or upon any person permitted to accept service pursuant to § 52-57(c), or pursuant to § 33-929 or Sec. 38a-25, if the defendant is a foreign corporation.

General Statutes Section 52-72 authorizes the amendment of a defective return date and provides that "the amended process *shall be served in the same manner as other civil process* and shall have the same effect, from the date of service, as if originally proper in form ..." (Emphasis added.) The purpose of the statute, enacted in 1917, "is to provide for amendment of otherwise incurable defects that go to the court's jurisdiction." *Concept Associates, Ltd. v. Board of Tax Review,* 229 Conn. 623 (1994); see also *Hoxie v. Payne,* 41 Conn. 539, 540 (1874) ("When the power to hear and determine a cause is wanting, as in this case [defective return date], there is no jurisdiction, and no court can pass an order creating jurisdiction for itself"). The statute authorizes amendment, "but requires new service of the amended writ." Stephenson's Connecticut Civil Procedure, (3rd Ed.1997) Sec. 62, p. 205-06. The amendment of an incorrect return date is not merely a rectification of a "minor defect" in the writ, and therefore, it requires new service of process. *Hartford National Bank & Trust Co. v. Tucker,* 178 Conn. 472, 478-79, 423 A.2d 141 (1979). While Section 52-72 is clearly a remedial enactment, and "must be liberally construed in favor of those whom the legislature intended to benefit"; *Concept Associates, Ltd. v. Board of Tax Review, supra* 229 Conn. 618, 623, 642 A.2d 1186; *Galluzzo v. Board of Tax,* 44 Conn.Supp. 39, 13 CONN.L.RPTR. 507 (1995); it nevertheless is evident that "new service of the amended writ," to be "served in the same manner as other civil process," requires service in compliance with the statutory provisions governing valid service of civil process.[4]

The court conducted an evidentiary hearing on this motion; on the record established, it is clear that the plaintiff did not comply with the statutes dealing with service of process on corporate defendants. The testimony of the sheriff indicated that he informed the plaintiff that the defendant's attorney was not the proper agent for service of process.[5] "Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." *Zanoni v. Hudon,* 42 Conn.App. 70, 77, 678 A.2d 12 (1996).

***3** The court recognizes the burdensome consequences the granting of this motion will have for this plaintiff; and, it is distressing to enter a ruling having the effect of curtailing an individual's court access on technical grounds raised by a corporate defendant. However, the pro se plaintiff in this case has been given considerable latitude and instruction by the court and, notwithstanding prior opportunities, still has not complied as directed. Since, for the reasons stated herein, it is the court's view that the grounds asserted in support of the motion to dismiss are sound, the motion is hereby granted.

All Citations

Not Reported in A.2d, 1998 WL 161166

Footnotes

1 Judge Wagner's order cited *Concept Asoc. Ltd. v. Board of Tax Review,* 229 Conn. 618, 642 A.2d 1186 (1994), and General Statutes Sec. 52-72.

2 General Statutes § 33-922 provides in relevant part: "(a) A foreign corporation may apply for a certificate of authority to transact business in this state by delivering an application to the Secretary of the State for filing. The application shall set forth: (1) The name of the foreign corporation ... (4) the street address of its principal office; (5) the address of its registered office in this state and the name of its registered agent at that office; and (6) the names and business address or if there is no business address for any such person, the residence address, of its current directors and officers."

3 General Statutes § 33-926 provides: "(a) Each foreign corporation authorized to transact business in this state shall continuously maintain in this state (1) A registered office that may be the same as any of its places of business; and (2) a registered agent, who may be: (A) A natural person who is a resident of this state; (B) a domestic corporation; or (C) a corporation not organized under the laws of this state and which has procured a certificate of authority to transact business in this state. (b) In addition to persons or entities who may act as a registered agent pursuant to subsection (a) of this section, a foreign corporation may appoint the Secretary of the State or his successor in office to act as its registered agent." General Statutes § 33-929 provides in relevant part: "(a) The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation. Service may be effected by leaving a true and attested copy of the process, notice or demand with such agent or, in the case of an agent who is a natural person, by leaving it as such agent's usual place of abode in this state. (b) A foreign corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the foreign corporation at its principal office shown in its application for a certificate of authority or in its most recent annual report if the foreign corporation; (1) Has no registered agent or its registered agent cannot with reasonable diligence be served ... When the Secretary of the State and his successors have been appointed such corporation's registered agent, a foreign corporation ... may be served by any proper officer ... by leaving two true and attested copies thereof together with the required fee at the office of the Secretary of the State or depositing the same in the United States mail, by registered or certified mail, postage prepaid, addressed to such office ..." General Statutes §§ 38a-25, entitled "*Insurance Commissioner as Agent for Service of Process*" provides in relevant part: (a) the Insurance Commissioner is the agent for receipt of service of legal process on the following: (1) Foreign or alien insurance companies authorized to do business in this state in any proceeding arising from or related to any transaction having a connection with this state. (b) Each foreign ... insurer by applying for and receiving a license to do business in this state ... is considered to have irrevocably appointed the Insurance Commissioner as his agent for receipt of service of process in accordance with subsection (a) of this section. Such appointment shall continue in force so long as any certificate of membership, policy or liability remains outstanding in this state. (e) The right to effect service of process as provided under this section does not limit the right to serve legal process in any other manner provide by law. Section 38a-26, entitled "*Procedure for service of process*" states: "(a) Service of process on the commissioner as provided in section 38a-25 shall be made by delivering two copies thereof to the commissioner, or to the office of the commissioner, or to an official or office of an official designated by the commissioner to receive service ... (b) The commissioner shall immediately send by registered or certified mail one copy of the process to the person to be served as follows ... (2) if a foreign insurance company, to the secretary of the company ... (d) Proof of service shall be evidenced by a certificate signed by the commissioner or by the official designated to receive service of process, showing the service made on him and mailing by him, attached to the second copy of the process."

4 It is recognized that certain cases refer to "original process" when requiring strict compliance with statutory requirements for service of process; these cases indicate that once an action has been properly instituted, service, in some cases, may be effected by serving the attorney who has appeared on behalf of the party. See e.g., *George v. Delpo, supra; Keith v. Mellich & Sexton, supra; Gangler v. Wisconsin Electrical Power Co.*, 110 Wis.2d 649, 329 N.W.2d 186, 190 (Wis. Supreme Court, 1983); *Milwaukee County v. Labor and Ind. Rev. Commission*, 142 Wis.2d 307, 418 N.W.2d 35, 38 (Wis.App.1987). However, these cases do not deal with the amendment of a defective return date, or a statute permitting rectification of a jurisdictional defect not curable by amendment at common law, or a statute which expressly mandates that "[s]uch amended process shall be served in the same manner as other civil process ..."

5 At the evidentiary hearing on this motion, Deputy Sheriff Paul A. Ruel, Jr. testified that he informed the plaintiff that the defendant had a designated or appointed agent for receipt of service of process, the number of copies of documents that were required to be served, and the costs involved in effecting proper service of the process. Upon being so informed, plaintiff insisted that the sheriff serve the papers on the defendant's attorney. Since Sheriff Ruel was concerned regarding the validity of merely delivering the documents to the attorney, he had the plaintiff set forth in writing her directive to him, a copy of which was marked as an exhibit for the purpose of this motion. In addition to Sheriff Ruel's testimony, and the plaintiff's written directive, there was also filed his affidavit reciting that the plaintiff "specifically instructed [him] to serve the defendant by serving Attorney Hickey notwithstanding [his] indications to her that the defendant had an agent for service of process designated," and that when, pursuant to the plaintiff's directive, he attempted to serve the papers at the attorney's office, he was informed by Attorney Hickey "that he was not the authorized agent of the defendant and [was] not authorized to accept service on behalf of the defendant."

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